

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE TOBIAS and THOMAS TOBIAS,

Plaintiffs-Appellees,

v

JERRY E. ARCHBOLD, Trustee of the ANN
SMITH TRUST and Successor Co-Trustee
of the J. THOMAS SMITH TRUST, BANK
ONE, Successor Co-Trustee of the J. THOMAS
SMITH TRUST, NORTHEAST FINANCIAL
CORPORATION, doing business as COUNTRY
HOMES, INC., and OAKLAND WEST L.L.C.,

Defendants-Appellants.

UNPUBLISHED
December 4, 2003

No. 241048
Oakland Circuit Court
LC No. 01-031364-CH

Before: Murray, P.J. and Gage and Kelly, JJ.

PER CURIAM.

The trial court granted summary disposition to plaintiffs finding that plaintiffs had acquired title to certain disputed property marked by an old fence line under the doctrine of acquiescence. Defendants appeal as of right from a final judgment that was issued following the grant of summary disposition. We affirm. This appeal is being decided without oral argument under MCR 7.214(E).

Plaintiffs and defendants each own adjoining 40-acre parcels. These parcels are divided by an old fence line that has been in place, with some repairs, since at least 1936. When a survey was done in conjunction with plans to split plaintiffs' parcel into two 20-acre parcels, it was discovered that the fence line was not the actual boundary line. Plaintiffs brought this action to quiet title to the property within defendants' legal description, but on plaintiffs' side of the fence, asserting that the fence line had been treated as the boundary line for more than 50 years,. Finding that defendants presented no evidence to contradict the fact that the fence line had been treated as the boundary for more than 15 years, the trial court concluded that plaintiff had established acquiescence and granted summary disposition.

On appeal, defendants argue that since discovery had not closed, summary disposition was premature. Further, defendants argue that summary disposition should not have been granted since (1) a foundation was not established for the survey that established the boundary

line, and (2) plaintiffs witnesses were never shown to be property owners who could speak for defendants, and the affidavits defendants presented contradicted plaintiffs' position.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review de novo a trial court's decision on a motion for summary disposition. *Id.* The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *Shepherd Montessori Center Milan v Ann Arbor Twp*, ___ Mich App ___; ___ NW2d ___ (#233484, rel'd 11/6/03) slip op p 4. Summary disposition is proper before the completion of discovery if further discovery does not stand a reasonable chance of uncovering factual support for a party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

To establish their claim of acquiescence, plaintiffs only had to show that the fence line was treated as the true line for fifteen years. *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000). Plaintiff George Tobias' own testimony, the presence of a garage on the disputed property, and the affidavits of plaintiffs' witnesses, attesting that they had understood the fence line to be the boundary, was sufficient to establish that it was treated as the boundary. Defendants did not proffer any evidence to contradict this point.¹ Moreover, the affidavits proffered by defendants did not establish any fact in controversy. Although they established that parts of the fence line were obscured by bushes, they did not counter the proposition that the fence line had been treated as the boundary. Finally, the authentication and accuracy of the surveys may have been pertinent to the legal description incorporated into the ultimate judgment, but they were not pertinent to whether the fence line had been treated as the true boundary. Thus, the lack of foundation for the surveys would not have been a proper basis for denying summary disposition.

Defendants also argue that the trial court abused its discretion in not dismissing plaintiffs' claims for discovery abuses. Dismissal is permitted under MCR 2.313(B)(2)(c) for failure to obey an order to provide discovery. The ruling is reviewed for abuse of discretion. *Traxler v Ford Motor Co*, 227 Mich App 276; 576 NW2d 398 (1998). Here, the trial court concluded that the plaintiffs were "walking a fine line." The court also noted the strength of plaintiffs' claim and fashioned a remedy that would have provided defendant with most of the discovery he was requesting, but for the subsequent order granting summary disposition. Defendants suffered no apparent prejudice. Under these circumstances, we find no abuse of discretion.

Affirmed.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly

¹ Defendants' contention that plaintiffs' witnesses were not authorized to speak for defendants is without merit. Plaintiffs' witnesses were speaking of their own observations, not as representatives of defendants.